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No. 86-1615

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1986

— o —  
AZL ENGINEERING, INC.  
(formerly SERGENT HAUSKINS & BECKWITH),  
*Petitioner,*

v.

ALLENDALE MUTUAL INSURANCE COMPANY,  
*Respondent.*

— o —  
ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

— o —  
REPLY BRIEF OF PETITIONER  
AZL ENGINEERING, INC.

— o —  
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## TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
REPLY .....	1
1. The "Real Party In Interest" Rule .....	1
2. <i>March v. Mountain States Mut. Cas. Co.</i> .....	2
3. <i>Meredith v. The Ionian Trader</i> .....	3
4. <i>Fidelity &amp; Deposit Co. Of Maryland v. City Of Sheboygan Falls</i> .....	5
CONCLUSION .....	7

## TABLE OF AUTHORITIES

## PAGE

## FEDERAL CASES

<i>Aetna Life Ins. Co. v. Haworth</i> , 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937) .....	3, 6
<i>Fidelity &amp; Deposit Co. Of Maryland v. City Of Sheboygan Falls</i> , 713 F.2d 1261 (7 Cir. 1983).....	1, 5, 6, 7
<i>Galveston Dry Dock Const. Co. v. Standard Dredg. Co.</i> , 40 F.2d 442 (2 Cir. 1930) .....	4
<i>International Longshoreman's And Ware. U. v. Boyd</i> , 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650 (1954) .....	3
<i>Maryland Casualty Co. v. Pacific Coal &amp; Oil Co.</i> , 312 U.S. 270, 61 S.Ct. 570, 85 L.Ed. 826 (1940).....	6
<i>Mayberry v. Maroney</i> , 558 F.2d 1159 (3 Cir. 1977).....	4
<i>Meredith v. The Ionian Trader</i> , 279 F.2d 471 (2 Cir. 1960) .....	1, 3, 5
<i>Miner v. Atlass</i> , 363 U.S. 641, 80 S.Ct. 1300, 4 L. Ed.2d 1462 (1960) .....	4
<i>United States v. Aetna Cas. &amp; Sur. Co.</i> , 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 17, 12 A.L.R.2d 444 (1949) .....	7
<i>Wilson v. Nelson</i> , 183 U.S. 191, 22 S.Ct. 74, 46 L. Ed. 147 (1901) .....	4

## TABLE OF AUTHORITIES—Continued

	PAGE
STATE CASES	
<i>March v. Mountain States Mut. Cas. Co.</i> , 101 N.M. 689, 687 P.2d 1040 (1984) .....	1, 2, 3
<i>Greiss v. Scarborough Estates, Inc.</i> , 14 N.Y.2d 39, 197 N.E.2d 530 (N.Y. 1964) .....	4
<i>State v. Whitt</i> , 210 N.E.2d 279 (Ohio App. 1964).....	4
<i>United Nuclear Corp. v. Allendale Mut. Ins.</i> , 103 N.M. 480, 709 P.2d 649 (1985) .....	3
<i>Wilkey v. Wax</i> , 225 N.E.2d 813 (Ill.App. 1967).....	4
RULES	
F.R.C.P. 17(a) .....	1, 2
Supreme Court Rule 28.1 .....	1
MISCELLANEOUS	
Black's Law Dictionary, 5th Ed. (1979) .....	3, 4



## REPLY<sup>1</sup>

Reply will be made to four aspects of "Respondent's Brief In Opposition": (1) the "real party in interest" rule; (2) *March v. Mountain States Mut. Cas. Co.*, 101 N.M. 689, 687 P.2d 1040 (1984); (3) *Meredith v. The Ionian Trader*, 279 F.2d 471 (2 Cir. 1960); (4) *Fidelity & Deposit Co. Of Maryland v. City Of Sheboygan Falls*, 713 F.2d 1261 (7 Cir. 1983).

### 1. The "Real Party In Interest" Rule

In its Petition, AZL Engineering, Inc. (AZL)<sup>2</sup> strenuously argued under Point II (AZL Petition, 19-23) that respondent Allendale Mutual Insurance Company (Allendale) was not the "real party in interest" under F.R.C.P. 17(a) and, therefore, was precluded from bringing suit as F.R.C.P. 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest. \* \* \*" Further, in its "Conclusion" (AZL Petition, 28-30), AZL suggested a summary reversal of the 10th Circuit "on the basis of F.R.C.P. 17(a)'s 'real party in interest' rule alone". (AZL Petition, 28)

Significantly, Allendale's "Brief In Opposition" is devoid of any response to this argument. F.R.C.P. 17(a) and the "real party in interest" rule are not even mentioned. Petitioner, therefore, again respectfully requests a summary reversal of the 10th Circuit "on the basis of

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<sup>1</sup> Pursuant to Supreme Court Rule 28.1, the Court is advised that there is no change in the "List Of Parties" contained in AZL's Petition.

<sup>2</sup> Formerly Sergeant Hauskins & Beckwith

F.R.C.P.'s 'real party in interest' rule alone''. (AZL Petition, 28)<sup>3</sup>

## 2. March v. Mountain States Mut. Cas. Co.

The 10th Circuit did not rely on *March*. Nevertheless, Allendale now cites *March* for the proposition that a contingent subrogation right in favor of an insurer arises when a loss occurs even though payment has not been made. (Brief In Opposition, 7)<sup>4</sup> This argument does not go far enough. Mere possession of an inchoate right does not make one a "real party in interest" under F.R.C.P. 17(a). As the "real party in interest" rule focuses on the "party who, by the substantive law, possesses the right sought to be enforced" (AZL Petition, 20), citation to *March* does not solve Allendale's dilemma. In the instant situation, United Nuclear Corporation, (UNC) as the injured party, was the "real party in interest," not Allendale.

Nor does the mere possession of an inchoate right create a "case or controversy" or an "actual controversy". In addition to mere possession, there must also,

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<sup>3</sup> F.R.C.P. 17(a) and the "real party in interest" rule were argued in AZL's (then Sergeant Hauskins & Beckwith's) "Answer Brief Of Appellee/Defendant Sergeant, Hauskins & Beckwith" filed in the 10th Circuit and its "Brief In Support Of Motion To Dismiss" filed in the District Court. As Allendale takes no position to the contrary, AZL will not clutter the present record by attaching copies of those documents to this "Reply Brief".

<sup>4</sup> It seems somewhat ironic that Allendale would rely on a case wherein the policy provision provided that:

\* \* \* upon payment . . . , the policy required that Mountain States be subrogated to the rights of March against any parties who possibly would be liable \* \* \* (emphasis added)  
101 N.M. at p. 690

among other things, be a "controversy." See, e.g., *International Longshoreman's And Ware. U. v. Boyd*, 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650 (1954); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937); AZL Petition, 14-17.

Further, Allendale ignores the context of *March*. It was a coverage dispute between insurer and insured as are most of Allendale's cited cases. Insured was suing insurer over the extent of coverage. If analogous to anything, *March* is analogous to the coverage dispute evidenced by UNC's suit against Allendale, *United Nuclear Corp. v. Allendale Mut. Ins.*, 103 N.M. 480, 709 P.2d 649 (1985). Unlike *March*, the instant suit is plainly not one between insured and insurer over the extent of coverage.

Indeed, AZL submits that *March* is nothing more than the proverbial "red herring". A thorough reading of it shows that it provides no lessons applicable to the issues in the instant suit.

### 3. Meredith v. The Ionian Trader

Allendale cites *Meredith v. The Ionian Trader* for the proposition that "[t]o obtain the benefits of the doctrine of subrogation one of the conditions which the insurer must fulfill is payment, or sufferance of a judgment requiring payment, of the obligation owed the insured". (Brief In Opposition, 7) Assuming this to be a correct statement of the law, it, of course, ignores the meaning of "suffer". As basic a source as *Black's Law Dictionary*, 5th Ed. (1979) (hereinafter, *Black's*) defines "suffer" as follows:

To allow, to admit, or to permit. (citation omitted)  
 It includes knowledge of what is to be done under sufferance. (citation omitted). To suffer an act to be done or a condition to exist is to permit or consent to it; to approve of it, and not to hinder it. It implies knowledge, a willingness of the mind and responsible control or ability to prevent. *Wilson v. Nelson*, 183 U.S. 191, 22 S.Ct. 74, 46 L.Ed. 147 [(1901)].

\* \* \*

In *Miner v. Atlass*, 363 U.S. 641, 649, 80 S.Ct. 1300, 1305, 4 L.Ed.2d 1462, 1468 (1960), this Court recognized that the term "suffer a judgment" carried the connotations discussed in *Black's*, citing *Galveston Dry Dock Const. Co. v. Standard Dredg. Co.*, 49 F.2d 442 (2 Cir. 1930). Likewise, in *Wilson v. Nelson*, supra, this Court stated that one who executed a promissory note with an irrevocable power of attorney authorizing the confession of judgment and who subsequently had such a judgment entered against him "'suffered or permitted' a judgment to be entered against him, . . . ." 183 U.S. at p. 198, 22 S.Ct. at p. 77, 46 L.Ed. at p. 151. See also, *Mayberry v. Maroney*, 558 F.2d 1159, 1164 (3 Cir. 1977); *Wilkey v. Wax*, 225 N.E.2d 813 (Ill.App. 1967); *State v. Whitt*, 210 N.E.2d 279 (Ohio App. 1964).

A "judgment suffered" differs by leaps and bounds from a judgment obtained in an action vigorously contested on the merits. See, e.g., *Greiss v. Scarborough Estates, Inc.*, 14 N.Y.2d 39, 197 N.E.2d 530 (N.Y. 1964). Certainly, Allendale vigorously contested its obligation to pay UNC through denial of coverage, through trial and through appeal to the Supreme Court of New Mexico. As Allendale concedes, it finally paid UNC "in December 1985"

(Brief In Opposition, 3) for an incident which occurred "[i]n July 1979". (Brief In Opposition, 2) Most certainly, Allendale did not "suffer" a judgment. It fought tooth and nail against one.

Allendale cites *Meredith* without elaboration. There is no discussion of what "suffer a judgment" actually means. The reason for this omission is obvious. AZL needs say no more.

#### 4. Fidelity & Deposit Co. Of Maryland v. City of Sheboygan Falls.

In its separate "Petition For Writ Of Certiorari" in no. 86-1598, Kaiser Engineers has addressed the problems with the 10th Circuit's reliance on the *Fidelity & Deposit Co. Of Maryland* case (*Fidelity*). AZL will add only a few comments in light of the arguments presented in the "Brief In Opposition".

It seems apparent that Allendale has either overlooked or ignored the factual situation in *Fidelity*. In *Fidelity*, a contractor executed a performance bond with two towns with respect to an incinerator it had agreed to build. Fidelity was the surety on the bond. When the incinerator did not measure up, the towns made demand upon Fidelity under the bond. The *Fidelity* opinion explicitly notes that "they notified Fidelity that it must make good the difference in accordance with the bond". 713 F.2d at p. 1265. Fidelity disagreed with the towns and brought a declaratory judgment action. A number of observations crucial to the maintenance of a declaratory

judgment action flow from the foregoing recitation of facts.

*Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 570, 85 L.Ed. 826 (1940), requires: (1) a substantial controversy; (2) between parties having adverse legal interests; (3) of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. (AZL Petition, 14-15). In *Fidelity*, the towns had made a demand on Fidelity. Fidelity disagreed. An obvious controversy existed. In contrast, Allendale made no demand on AZL or Kaiser. Allendale simply filed suit contrary to *Aetna Life Ins. Co. v. Haworth*, supra. (See, AZL Petition, 11) Thus, in *Fidelity*, the first prong of the *Maryland Casualty Co.* test was satisfied. In the instant suit, it was not.

In *Fidelity*, Fidelity was the surety on a performance bond executed between a contractor and two towns. It thus became legally obligated to the towns in the event of the contractor's failure to adequately perform. Clearly, legal interests existed between Fidelity and the towns which, in the course of events, became adverse. In contrast, Allendale had no legally assertable interests as against AZL (or Kaiser) at the time it filed suit. (See, AZL Petition, 15-16) Allendale concedes that it did not pay UNC until December 1985. (Brief In Opposition, 3) Thus, in *Fidelity*, the second prong of the *Maryland Casualty Co.* test was satisfied. In the instant suit it was not.

As to the third prong of the *Maryland Casualty Co.* test, AZL simply notes its previous extensive discussion thereon. (AZL Petition, 16-19) AZL also briefly notes that the quotation from *Fidelity* at p. 7 of the "Brief In

Opposition" is taken out of context as simply reading the *Fidelity* opinion will demonstrate.

The *Fidelity* case supports neither the 10th Circuit nor Allendale.

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### CONCLUSION

Petitioner AZL submits that respondent Allendale's arguments in its "Brief In Opposition" do not rebut the arguments of AZL and Kaiser in their respective petitions. Most telling is Allendale's failure to even respond to AZL's "real party in interest" argument. It would seem patently obvious that until Allendale satisfied its obligation to UNC and made UNC whole in December of 1985, the "substantive right sought to be enforced" belonged to UNC. (AZL Petition, 19-23). *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 17, 12 A.L.R.2d 444 (1949). That being the case, the 10th Circuit must be reversed on that point alone and the District Court must be affirmed

Respectfully submitted,

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